UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CAPITOL RECORDS INC.; SONY BMG MUSIC ENTERTAINMENT; ARISTA RECORDS LLC; INTERSCOPE RECORDS; WARNER BROS. RECORDS INC.; and **UMG RECORDINGS INC.**, *Plaintiffs*, v. **JAMMIE THOMAS**, *Defendant*.	Case No. 06-cv-1497 (MJD/RLE) JURY DEMANDED

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

K.A.D. Camara
Camara & Sibley LLP
2339 University Boulevard
Houston, Texas 77005
713 893 7973
713-583-1131 (fax)
camara@camarasibley.com

Garrett Blanchfield
Brant D. Penney
Reinhardt, Wendorf & Blanchfield
332 Minnesota Street, Suite E-1250
St. Paul, Minnesota 55101
651-287-2100
651-287-2103
g.blanchfield@rwblawfirm.com

Attorneys for Defendant Jammie Thomas

Dated: June 10, 2009

MOTION TO DISMISS

Plaintiffs lack standing to bring this action. Because they can offer no admissible evidence that they have registered their copyrights, this court lacks subject-matter jurisdiction over their claims for copyright infringement. *See Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir.1993); *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir.1990). Plaintiff has the burden to prove that subject-matter jurisdiction exists. *Osborn*, 918 F.2d at 730 (citing *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891 (3rd Cir.1977)). Further,

> "[n]o presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts [does] not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Id.

If Plaintiffs cannot meet this burden, the court must dismiss the matter for lack of jurisdiction.

Under 17 U.S.C. § 411(a), "no action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made in accordance with this title." This registration requirement is the jurisdictional touchstone for this case. *See Murray Hill Publ'ns, Inc. v. ABC Commc'ns, Inc.*, 264 F.3d 622, 630 n. 1 (6th Cir.2001) (noting that while copyright protection exists prior to registration, "[t]he registration requirement under section 411[a] is a jurisdictional prerequisite to the right of the holder to enforce the copyright in federal court"); *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1285 (11th Cir. 2000) ("It is well settled in this Court that the registration requirement is a jurisdictional prerequisite to an infringement suit." (internal quotation marks omitted and alterations incorporated)); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1163 (1st Cir.1994) (describing registration under section 411(a) as a "jurisdictional requirement")); *Morris v. Business Concepts, Inc.*, 283 F.3d 502, 505 (2d Cir. 2002); *see also* 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.16[B][1][a], at 7-155 (2002). Plaintiffs cannot demonstrate compliance with this requirement.

I. THERE IS NO EVIDENCE OF COPYRIGHT REGISTRATION

Absence of admissible evidence of copyright registration is fatal to Plaintiffs' case. *See TVI, Inc. v. INFOSoft Technologies, Inc.*, No. 4:06-cv-697-JCH, 2006 WL 2850356 at *5 (E.D.Mo. 2006). ("Here, neither side disputes that InfoSoft's copyrights are not registered. Accordingly, it fails the requirements of 17 U.S.C § 411(a). Thus, its claims based on the Act must be dismissed for lack of subject matter jurisdiction.").

Plaintiffs, as in every copyright infringement action, have the initial burden to produce admissible evidence of valid certificates of registration. *See Original Appalachian Artworks, Inc. v. Toy Loft, Inc*. 684 F.2d 821, 826 (11th Cir. 1982) ("the burden of persuasion as to the validity of the copyright rests with the plaintiff in an infringement action").

Copyright records are public records. To meet their burden of persuasion, Plaintiffs must prove their evidence of records from the Copyright Office under F.R.C.P. 44(a)(1), F.R.E. 1005, or F.R.E. 1002 - 1004.

The evidence produced by Plaintiffs does not comport with the provisions of F.R.C.P. 44(a), which provides the general method for proving official records like copyright registrations. FRCP 44(a) requires either (1) an official publication of the record or (2) a copy attested by the officer with legal custody of the record. Plaintiffs have provided neither.

Whenever the burden of Rule 44(a)(1) cannot be met, a party must pass through the gateway of Rule 1005 to prove the contents of a public record. *U.S. v. Childs*, 5 F.3d 1328, 1335 (9th Cir. 1993) ("If the exhibits in question were introduced to prove the content of public records as such, the government would have been required to comply with Rule 1005"). In a copyright action, it is necessary to prove the contents of the certificate of registration to show that the listed Copyright Claimant is the plaintiff, the listed title is the title of the copyrighted work, the copy of the work deposited with the copyright office matches the work at issue in the case, etc.

Rule 1005 demands that the plaintiff prove the contents of a public record "by copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original." The term ‘original’ refers to the relevant public records in the custody of the Copyright Office, i.e. the certificates of registration. Plaintiffs have not and cannot meet the burden of either method of proving a public record under Rule 1005. Rule 902 requires a certificate attesting to the correctness of the proffered copy executed by an authorized person from the Copyright Office. Plaintiffs do not have these certificates. Nor can Plaintiff produce any witnesses capable of testifying that they have compared the documents submitted as evidence to the court, with the originals in the Copyright Office.

Other evidence of the contents of a public record can be given only if "a copy which complies with [either Rule 902 or the rule of witness testimony] cannot be obtained by the exercise of reasonable diligence." Plaintiffs have had one prior trial and over eighteen months since that trial to prepare the evidence for this case. There were no barriers at the Copyright Office to prevent Plaintiffs from obtaining certified copies of certificates of registration. Reasonable diligence in this matter was more than adequate to obtain admissible evidence. Having failed in this measure of diligence, Rule 1005 prevents Plaintiffs from presenting other evidence to prove the contents of the original certificates of registration.

Plaintiffs, not claiming the documents are originals (which reside at the Copyright Office), may resort to Rule 1003. However, a duplicate is not admissible if "a genuine question is raised as to the authenticity of the original." Concerning Plaintiffs documents, we note as before, that some copies show a seal from the Registrar of the Copyright Office, and some do not. Some copies indicate, by what appear to be people's initials, that they have been examined and checked by Copyright Office employees, while others indicate they have been examined but not checked. Some indicate funds received with the application, others have no such indication. These irregularities raise a genuine question about the authenticity of the originals.

Generally, if a question is raised about authenticity, it is resolved if the document is either self-authenticating or sufficient additional extrinsic evidence is offered to show "the matter in question is what its proponent claims". The documents proffered by Plaintiffs do not meet the self-authentication requirements. See F.R.E. 902. In this case, Rule 1005, as discussed above, precludes use of additional evidence to prove the contents of the documents. Therefore, under Rule 1003 the documents remain unauthenticated and unable to benefit from further extrinsic evidence due to the prohibition of Rule 1005.

Rule 1004 is not available because original certificates are in the custody of the Copyright Office. The documents proffered by Plaintiffs, failing to meet the requirements of Rule 44(a)(1), Rule 1005, or Rule 1003, cannot be used as evidence of registration.

Even if Plaintiffs could somehow procure certified copies of certificates of registration before trial, F.R.C.P. 37(c)(1) would disallow the use of this evidence for any motion, including this one, or the trial itself. Rule 37(c)(1) disallows information a party has failed to timely disclose in accordance with Rule 26(a). At least thirty days before trial, or as scheduled by the court, a party must disclose their trial exhibits. F.R.C.P. 26(a)(3)(B). In this case, the court set June 1, 2009 as the date when these pre-trial disclosures were due. Failure to submit an exhibit in accordance with the established deadlines results in exclusion unless the new evidence is either harmless or its introduction is substantially justified. F.R.C.P. 37(c)(1).

Any new evidence of copyright registration would harm Defendant. Plaintiffs, who have litigated this matter countless times, in forums across the nation, understood their obligations and do not have any substantial justifications for their failure to produce certified evidence from the Copyright Office. See, e.g. *Leathers v. Pfizer*, 233 F.R.D. 687 N.D.Ga. 2006 ("Plaintiff's nondisclosure is not substantially justified because the conduct of Plaintiff indicates that he understood the October 15 expert deadline to apply to all experts. Defendants correctly point out that 'Plaintiff clearly knew and understood his obligations under the rules . . .'). As a matter of law, in accord with Rule 37(c)(1), Plaintiffs cannot now introduce new evidence.

We think the case ends here. By previous court order, judicial notice of certificates of registration is foreclosed. As a matter of law, Plaintiff's proffered documents cannot be used to prove the contents of the certificates of registration in the Copyright Office. Nor can other extrinsic evidence be offered to support the alleged truth of those documents. Finally, the Federal Rules of Civil Procedure disallow new evidence to enter the case at this point. See F.R.C.P. 37(c)(1).

II. CONCLUSION

The deficiency in the registration documents is equally fatal to subject-matter jurisdiction and proof of infringement. Plaintiffs proffer CD's into evidence with no showing that they are duplicates of the original copyrighted works deposited with the Copyright Office. In fact, the only possible proof of authenticity for the CD's is an inference based on the artists and titles of the CD's matching the artists and titles on the proffered documents. However, no such inference can be drawn when the source documents are not proof of the contents of the certificates of registration. The evidence fails completely.

We respectfully request that our motion to dismiss be granted.

Respectfully submitted,

/s/ K.A.D. Camara
K.A.D. Camara
Camara & Sibley LLP
2339 University Boulevard
Houston, Texas 77005
713 893 7973
713-583-1131 (fax)
camara@camarasibley.com

Garrett Blanchfield
Brant D. Penney
Reinhardt, Wendorf & Blanchfield
332 Minnesota Street, Suite E-1250
St. Paul, Minnesota 55101
651-287-2100
651-287-2103
g.blanchfield@rwblawfirm.com

Attorneys for Defendant Jammie Thomas

Dated: June 10, 2009